SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

No. 123.

SAND FILTRATION CORPORATION OF AMERICA, Appellant,

vs.

SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY, and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR S. JEKYLL.

BRIEF FOR APPELLANT.

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Charles L. Frailey,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 123.

SAND FILTRATION CORPORATION OF AMERICA,
APPELLANT,

vs.

SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY, AND THOMAS E. STAGG, AND ROBERT H. MAY, GEORGE E. JEKYLL, AND ARTHUR B. JEKYLL.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of that District. Several questions were presented to and determined by the lower courts, but the only question which will be raised in this court is as to whether those courts correctly construed certain clauses in a contract between the appellant and a firm composed of the appellees, Cowardin, Bradley, Clay and Stagg, hereinafter referred to as Cowardin and Company.

On the 6th day of April, 1903, Cowardin and Company entered into a contract with the United States for the construction of a filtration plant in the District of Columbia.

On the 26th day of May, 1903, Cowardin and Company, by a written contract, employed the firm of May and Jekyll to do the work called for by the contract with the United States, agreeing to pay May and Jekyll 90 per cent of the money which the Government was to pay to Cowardin and Company (Record, 41).

On the 25th day of August, 1903, by another written contract between Cowardin and Company and May and Jekyll, the contract between those parties of May 26, 1903, was cancelled (39), and on the same day Cowardin and Company entered into an agreement with Henry B. Dean (trading under the firm name of Dean and Shibley), by which Dean, or a corporation to be organized by him and to be called the Sand Filtration Corporation of America, agreed to complete the contract with the Government in the place of May and Jekyll (14).

By this contract it was provided that as Cowardin and Company were insolvent a receiver should be appointed in order to wind up the business of that firm, and that Dean was to be employed by the receiver of Cowardin and Company, when appointed, to finish the work. In case the receiver should not be appointed within ten days the contract between Cowardin and Company and Dean was to be void (15).

On the day of August, 1903, a bill was filed in the Supreme Court of the District of Columbia for the appointment of a receiver for Cowardin and Company, and on the same day that court appointed John D. Maclennan as such receiver, and authorized him as such receiver to enter into a contract with Dean for the completion of the work under the Government contract. On the 27th day of August, 1903, the receiver, pursuant to the order of court, by a written contract employed Dean to complete the work of constructing the filtration plant (18).

By the agreement of August 25, 1903, between Cowardin and Company and May and Jekyll, certain payments hereinafter more particularly referred to were to be made by Cowardin and Company to May and Jekyll (40). By the agreement of the same date between Cowardin and Company and Dean, the latter assumed the obligation of making these payments to May and Jekyll (16).

By these several contracts as they then stood, the receiver would have been required to make these payments to Dean; Dean would then have been required to repay the money to the receiver; and the receiver would then make the payments to May and Jekyll. But by a supplemental agreement between Cowardin and Company and Dean, dated August 27, 1903—the same date that the contract between the receiver and Dean was entered into—it was provided that instead of the receiver paying the money to Dean and receiving it back from Dean for transmission to May and Jekyll, he, the receiver, should make the payments direct to May and Jekyll (18).

The Sand Filtration Corporation was organized by Dean and it finished the work on the filtration plant in accordance with the terms of the contract between Cowardin and Company and the Government. Thereupon the controversy arose which this court is called upon to decide, and which will now be stated.

The contract of May 26, 1903, between Cowardin and Company and May and Jekyll required the latter, among other things, to advance to Cowardin and Company the sum of $10,000, which was to be repaid by Cowardin and Company out of the installments which they were to receive from the Government for doing the work (44). By the contract dated August 25, 1903, between the same parties it was recited that there remained due from May and Jekyll to Cowardin and Company of this $10,000 the sum of $8,000, and in reference to this sum of $8,000 the last-mentioned contract contained the following language:

"The parties of the first part [Cowardin and Company] hereby covenant and agree to repay the parties of the second part [May and Jekyll], or to their order, the said sum of eight thousand dollars ($8,000) *out of the net profits* which may be realized by the parties of the first part *from the construction or erection* of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said eight thousand dollars ($8,000), if the same shall not sooner be voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the ten per cent. of the contract price for said work which will be reserved to the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to perform the same, *or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part, appropriate provision shall be made for the reservation and payment of said eight thousand dollars ($8,000) to the parties hereto of the second part;* it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the eight thousand dollars ($8,000) shall be *under the contingency that the parties of the first part shall realize a profit* under said contract with the United States and not otherwise; and that *if any profit shall be so realized by them,* it shall be subjected to the payment of the said eight thousand dollars ($8,000), or so much thereof as said profits will pay and satisfy."

It will be remembered that on the same day that this contract between Cowardin and Company and May and Jekyll was entered into—May 25, 1903—Cowardin and Company entered into the contract with Dean by which the latter was to be employed to perform the work on the filtration plant for Cowardin and Company, such employment to be through the instrumentality of an agreement with a receiver to be thereafter appointed. This cotemporaneous contract between Cowardin and Company and Dean contains the following paragraph (16):

"Fourth. As consideration for the construction plant by this instrument acquired by the grantee [Dean], or The

Sand Filtration Company of America, the grantee until the said The Sand Filtration Company of America has been organized and substituted and thereafter the said last named company, assume and agree to pay all the debts of May and Jekyll specified in Schedule B hereto attached and a part hereof, when and as they or it may arrange with the several creditors, and in general to comply with the provisions and conditions of one certain agreement entered into between the grantors [Cowardin and Company] and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of $8,000 to the said May and Jekyll *as in said agreement is provided*, and the payment of which is also assumed by the said grantee; and also to pay to the receiver the sum of $65,000, to be distributed thereafter as the court may direct, which said sum of $65,000 shall become due and payable as follows: The sum of $10,000 on September 15th, 1903, $15,000 on January 15th, 1904, $10,000, on March 15th, 1904, $10,000, on May 15th, 1904, and the remaining $20,000 on the completion of the said filtration plant and at the time of the final payment thereon by the United States: and the said grantee, and the Sand Filtration Company of America, when said Company shall have been substituted for the said grantee, shall also pay to the grantors or their attorney for them the sum of $3,517.50—said sum having been paid by the grantors on account of pay-roll and other expenses since the commencement of negotiation between the parties hereto, and further to pay all other expenses and obligations necessary to be incurred between the date of this contract and the execution of the formal contract with the receiver hereinafter to be appointed for the grantors."

When the filtration plant was completed and paid for by the Government it was found that the Sand Filtration Corporation of America instead of making a profit in the enterprise had sustained a loss of about $100,000. It contended that by the proper construction of its contract with Cowardin and Company it was required to pay this sum of $8,000 to May and Jekyll only out of the profits of the construction of the filtration plant and that as there were no such profits it was not liable at all. May and Jekyll, on the other hand,

insisted that the contract of Dean with Cowardin and Company of August 25, 1903, in connection with the supplemental contract between the same parties of August 27, 1903, required that the receiver should pay this sum of $8,000 to May and Jekyll whether there had been a profit in the work on the filtration plant or not.

These and other contentions being brought to the notice of the receiver, he refused to distribute the sum of $20,000 which was left in his hands until the parties should settle their differences.

On the 13th day of March, 1906, Cowardin and Company filed a petition in the case in which the receiver had been appointed setting forth in substance the foregoing facts and asking the court to issue a rule against the receiver and the Sand Filtration Corporation of America to show cause why he should not pay to Cowardin and Company $10,000 of the money which he had in his hands, and why he should not pay the further sum of $8,000 to May and Jekyll (1-6). The court issued a rule accordingly (7). Answers to the rule were duly filed by the receiver (8), by May and Jekyll (9), and by the Sand Filtration Corporation of America (11). It will appear by the petition and the answers that there were several items in controversy. On this appeal, however, no question will be made, except as to the sum of $8,000 hereinabove referred to.

The case came on for final hearing on the petition and answers, and on April 3, 1906, Chief Justice Clabaugh signed an interlocutory decree adjudging that the sum of $8,000 should be paid by the receiver to May and Jekyll, but withholding a final decree and referring the case to the auditor of the court for a report as to another subject of controversy between the parties (21). Upon the coming in of the auditor's report a final decree was entered directing the receiver to pay the sum of $8,000 in question to the solicitors of record of May and Jekyll (52). The Sand Filtration Corporation from this decree appealed to the Court of Appeals of the District. That court affirmed the decree below

(61). The opinion of the Court of Appeals was delivered by Mr. Chief Justice Shepard and will be found on pages 55 to 60 of the record.

The Sand Filtration Corporation thereupon appealed to this court. It stands in the place of Dean under the contracts described above, but as Dean made the contracts they will be hereinafter considered as though he were the party in interest.

Assignments of Error.

The Court of Appeals erred:

1st. In holding that by the true construction of the contracts of August 25 and August 27, 1903, between Cowardin and Company and Dean, the firm of May and Jekyll was entitled to have the receiver pay them the sum of $8,000 in controversy, notwithstanding the admitted fact that no profit had been realized from the construction or erection of the filtration plant.

2d. In not reversing so much of the final decree of the Supreme Court of the District of Columbia, dated October 8, 1906, as directed the receiver to pay said sum of $8,000 to the solicitors of record of May and Jekyll.

ARGUMENT.

It will be seen that the single question to be decided is whether May and Jekyll were to receive the $8,000 unconditionally, or whether it was to be paid to them only in case the filtration plant should be completed at a profit.

Whatever difficulty there might otherwise be in deciding this question, upon examination of the several contracts in the record, it seems to counsel for the appellant to disappear when due consideration is given to the fact that all these contracts (except the original agreement of May 26, 1903, between Cowardin and Company and May and Jekyll) represent practically a single and simultaneous transaction.

It is obvious that on the 25th day of August, 1903, May and Jekyll wished to be relieved of their contract; that Cowardin and Company were willing that May and Jekyll should be so relieved; that Cowardin and Company were financially unable to go on with the work themselves; that Dean was willing to undertake the completion of the filtration plant in place of May and Jekyll; and that all parties had agreed to the substitution with the condition on the part of Dean that a receiver should be appointed for Cowardin and Company, and that he should complete the filtration plant pursuant to his agreement with Cowardin and Company under an agreement with the receiver when appointed.

In the petition of Cowardin and Company upon which this case arises, they refer (4) to their contract of August 25, 1903, with May and Jekyll, and (2) "the contemporaneous contract of the same date between these petitioners and the said Dean." Indeed, both these contracts bear the same date—August 25th—and were both executed in Washington, the contract with Dean of that date expressly reciting that it was executed in Washington (17) and the contract of the same date with May and Jekyll being witnessed by Charles Cowles Tucker and Charles A. Douglass, both Washington attorneys. In the contract with May and Jekyll of August 25th, cancelling the agreement of May 26, 1903, Cowardin and Company assume certain obligations and agree that if they "shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to perform the same, or if the same shall be performed by any person or persons" on their behalf, "appropriate provision shall be made for the reservation and payment of said eight thousand dollars ($8,000) to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States and not otherwise" (40).

It will be seen from this that not only were Cowardin and Company when this contract was executed simultaneously arranging with Dean to do the work for them, but May and Jekyll understood that the obligations of Cowardin and Company were to be transferred, with the work of completing the filtration plant, to somebody else.

So in the agreement of August 25th between Cowardin and Company and Dean, after the recital that the contract between Cowardin and Company and May and Jekyll has been cancelled, and that Cowardin and Company are financially unable to carry out their contract themselves, provision is made for the appointment of a receiver of Cowardin and Company and for the hiring of Dean by the receiver when appointed (14, 15). It does not expressly appear in the record now before the court when Cowardin and Company filed their bill for the appointment of a receiver, or when the receiver was appointed. In the petition, however, it is stated that "shortly prior to the institution of this suit, on, to wit, August 25th, 1903, the said May and Jekyll had entered into an agreement with petitioners for the cancellation of their original contract" (2). In the contract between Cowardin and Company and Dean of August 25th, provision is made for the filing of a bill and the appointment of a receiver. The contract between the receiver and Dean is dated August 27th (18), so that the bill must have been filed and the receiver appointed either on the 25th, the 26th or 27th day of August. (As a matter of fact, which it is presumed counsel will not controvert, the bill was filed by Stagg, one of the partners of Cowardin and Company, against the other three members of that firm, on the 27th day of August, and on the same day answers were filed by all the defendants; the receiver was appointed, the receiver filed his bond; and the court made an order authorizing the receiver to enter into the contract with Dean, which was in fact entered into on the same day.) And on the same day, it will be remembered, the supplemental agreement between Cowardin and

Company and Dean, providing for payments directly to May and Jekyll by the receiver, was entered into (18).

From all this it is submitted that there can be no question that the contract of August 25 between Cowardin and Company and May and Jekyll; the contract of the same date between Cowardin and Company and Dean; the filing of the bill and the appointment of a receiver; the contract between the receiver and Dean; and the supplemental agreement between Cowardin and Company and Dean, all represent the means adopted by the parties in interest to effect the single operation of having Dean employed in the place of May and Jekyll to complete the filtration plant under the contract between Cowardin and Company and the Government.

It seems equally obvious why the doing of what appears to be a simple thing required so much circumlocution.

Section 3477 of the Revised Statutes of the United States makes void all transfers and assignments of claims against the United States, unless they are executed "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." It requires but a casual inspection of the original contract of May 26 between Cowardin and Company and May and Jekyll to show that it contains provisions which it would probably have been impossible for May and Jekyll to enforce in the face of the section referred to. But this court in March, 1899, in the case of Price *vs.* Forrest, 173 U. S., 410, decided that where a claim against the United States has been transferred to a receiver appointed by a court of competent jurisdiction that this does not constitute an assignment within the prohibition of section 3477. Hence the appointment of a receiver in this case, and the making of a contract with him by Dean under the order and approval of the court appointing the receiver.

Another thing which it is important to bear in mind seems to have been entirely overlooked by the Court of Appeals in this case, and that is that the contract with the Gov-

ernment was performed by Cowardin and Company through their receiver. In this business the United States dealt only with Cowardin or its representative, the receiver appointed by the court to act for it. The receiver employed Dean to do the work for the receiver, but Dean was only an employee of the contractor. He was not the contractor. Dean might have failed to go on with the work. His contract with the receiver might have been cancelled and some one else substituted in his place just as he had been substituted in the place of May and Jekyll, but the Government looked to Cowardin and Company, through its representative, the receiver, and when money was to be paid by the Government it was paid to Cowardin and Company, through its representative, the receiver. If there was any profit in the contract it was the profit of Cowardin and Company. True, Cowardin and Company might agree with Dean or with anybody else to pay that profit to him for a consideration, just as it might agree with Dean or anybody else that if the work was done at a loss such third person should shoulder that responsibility, but these considerations could not affect the position of Cowardin and Company as the contractor in the case.

It is with these facts in view that we approach the consideration of the language used by the parties in their contracts, the construction of which is the subject for determination.

There can be no mistaking the meaning of the contract of August 26 between Cowardin and Company and May and Jekyll (40). By that instrument Cowardin and Company were to pay the $8,000 out of the net profits which might be realized by them "from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect." And further, they stipulate that if they shall procure some third party to do the work, appropriate provision shall be made for the payment of the $8,000 by such third party, and then they

add this significant, and it would seem conclusive, language—"it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States and not otherwise," and that "if any profit shall be so realized by them, it shall be subjected to the payment of the said eight thousand dollars ($8,000), or so much thereof as said profits shall pay and satisfy."

This case has been dealt with by the Court of Appeals in its opinion just as though the contract from which these quotations are made had been executed months or years before the date of the contract by which Dean agreed to take the place of May and Jekyll. But, as a matter of fact, on the very same day that this contract was entered into between Cowardin and Company and May and Jekyll, Dean agrees with Cowardin and Company that if a receiver shall authorize Dean to do so, he will complete the work on the filtration plant, and will assume the liabilities of Cowardin and Company to May and Jekyll, the exact language of Dean's agreement being (16) "in general to comply with the provisions and conditions of one certain agreement entered into between the grantors [Cowardin and Company] and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of $8,000 to the said May and Jekyll as in said agreement is provided."

Therefore, we have a contract between A and B and a contract between B and C simultaneously executed, the contract between B and C making the contract between A and B a part of it. The contract between A and B provides that B shall pay A $8,000 in a certain contingency, and the contract between B and C provides that C in the place of B shall pay the $8,000 to A as in the agreement between A and B provided. And the question is whether under contracts so

providing C is bound to pay the $8,000 to A without regard to the contingency.

Counsel for May and Jekyll, however, insisted, and their contention has been sustained by the courts below, that Cowardin and Company are shown to have made a profit in this business by selling the plant which they acquired from May and Jekyll to Dean and that that profit is such as is contemplated by the agreement of August 25 between Cowardin and Company and May and Jekyll.

It does not sufficiently appear in this record that Cowardin and Company did make any profit in the transaction. There nowhere appears a statement showing in full what they have paid out or what they have received in connection with this Government contract. We do not think it properly can be assumed, as the Court of Appeals assumed, that the $65,000 which Dean paid or caused to be paid to Cowardin and Company was all profit, or that any part of it was profit. The Court of Appeals says that Cowardin and Company received this $65,000 "without one dollar of actual expenditure in the performance of their contract with the Government, *so far as the record shows.*" The fact is that the record does not show anything about it, except the unsupported averments of Cowardin and Company in their petition. There is no admission in the answer of the Sand Filtration Corporation that this averment is true, and neither Cowardin and Company nor May and Jekyll have attempted to prove it. The record shows only the further fact that on August 25 Cowardin and Company were financially embarrassed to such an extent that it was necessary to appoint a receiver to wind up their affairs (14).

But, aside from this, with all deference to the courts below, it is difficult to see how a supposed profit realized by the sale of articles used in the carrying out of a contract can be held to be a profit made in the construction or erection of the plant which is the subject-matter of the contract itself. This would seem to be so even if the sale of the articles took place

at one time and the agreement by a third person to pay something in consideration of a profit on the work were made at a subsequent period. But when the two things occur at one and the same time, it seems unreasonable to sustain the view of the matter which has been taken by the Court of Appeals. When Cowardin and Company on the 25th day of August, 1903, agreed to pay May and Jekyll $8,000 from the profits which might be realized out of the construction or erection of the filtration plant, they simultaneously agreed, through the instrumentality of the receiver, to employ Dean to take their place and make the payment, making their contract with May and Jekyll a part of their contract with Dean. At the same moment, and by the same contract, Dean agreed to pay to Cowardin and Company the $65,000. If the $65,000 was the profit intended, it was realized as soon as the papers were signed. In that event the time of the payment of the $8,000 would have been provided for just as the payment of the $65,000 was provided for. Instead of agreeing to pay $65,000 in installments, Dean would have agreed to pay $73,000 in installments. To adopt this construction of the contract requires that everything contained in the agreement of August 25, between Cowardin and Company and May and Jekyll in regard to a profit in the construction or erection of the filtration plant shall be struck out of the contract. It has no meaning and can be given no effect. That language can play no part in the disposition of the question under consideration, except on the theory that Cowardin and Company were to go on with the contract through their receiver and his employment of Dean, and that if in doing the work in that way it turned out that there was a profit, the $8,000 should be paid out of that profit, or, to quote the contract, "so much thereof as said profits will pay and satisfy."

The contract between Dean and the receiver was made on the 29th day of August, 1903. The filtration plant was not completed, as the petition of Cowardin and Company states, until "on or about the — day of January, 1906" (3). If

the supposed profit of $65,000, made by Cowardin and Company by the sale of their plant to Dean in August, 1903, was the profit out of which the $8,000 was to be paid to May and Jekyll, why did May and Jekyll wait until 1906 to demand it? Indeed, who can read the contracts in question and find out when the $8,000 was due, if it was not due either on the 25th day of August, 1903, or at the end of the work, when it was ascertained whether the work was done at a profit or not. And if it was due on the 25th day of August, 1903, why were so many unnecessary provisions about it inserted in the contract of that date between Cowardin and Company and May and Jekyll? (40).

It will be argued that there is nothing in the record to show that May and Jekyll had anything to do with the contract between Cowardin and Company and Dean—that there was no privity between them and Dean. But in their contract of August 25, May and Jekyll expressly agreed that Cowardin and Company might employ some third person to finish the work under the Government contract, and when the receiver was appointed and their dealings thereafter were with the receiver, it is inconceivable that they did not know of the employment of Dean. And if they did know it, and their present construction of that part of their contract with Cowardin and Company was their construction then, why did they not go to Cowardin and Company, or the receiver, or Dean, and demand their $8,000?

To be sure, as the Court of Appeals says, all parties in August, 1903, no doubt took it for granted that a profit would be realized under the contract with the Government. But that does not indicate, as that court holds, that for that reason Dean unconditionally agreed to pay the $8,000. It indicates, on the contrary, that May and Jekyll were content to wait till the work was all done and paid for by the Government, and then get the $8,000 out of the sure profits.

Finally, counsel for May and Jekyll rely upon the supplemental contract between Cowardin and Company and Dean of August 27, 1903 (18). Here they claim privity appar-

ently, while denying it as to the contract to which the agreement of August 27 is supplementary. Upon examination of the contract of August 25 between Cowardin and Company and Dean it will be seen that it provides that Cowardin and Company shall pay *to the receiver* the installments making up the sum of $65,000 (16). There is in that contract no provision as to when or through whom the $8,000 was to be paid. The contract of August 27 between Cowardin and Company and Dean (18) merely clears up certain ambiguities in the contract of August 25. It does away with circuity of procedure by providing that instead of the installments of the $65,000 and the $8,000 being paid by the receiver to Dean, then back by Dean to the receiver, and then by the receiver to May and Jekyll, they shall be made directly by the receiver to May and Jekyll. In the preamble of this contract of August 27 it is expressly stated that the object in making it is to clear up the meaning of provisions "apparently capable of inconsistent constructions" which are contained in the contract between the same parties of August 25 "and in the accompanying paper." The accompanying paper here referred to must be the copy of the contract of August 25 between Cowardin and Company and May and Jekyll, which is attached to and made a part of the contract of that date between Cowardin and Company and Dean. If, as we think we have shown is the case, by the true construction of the contract between Cowardin and Company and Dean of August 25, the $8,000 was not to be paid to May and Jekyll unless a profit was made in doing the work under the Government contract, it is impossible to hold that by the supplemental agreement of August 27 Dean agreed that the $8,000 should be paid to May and Jekyll unconditionally. If that had been the intention something would have been stated as to when the $8,000 was to be paid. But as neither that contract nor the one to which it is a supplement fixes any time for the payment of the $8,000, the latter contract but affirms the conclusion reached by a consideration of the earlier one; that the reason no time was fixed for the

payment of the $8,000 was because whether it should be paid at all depended upon whether there should be a profit in the doing of the work, and that could not be determined until the work was finished and accepted by the Government and the final payments made by the Government.

In significant contrast with the language of the contracts in evidence in reference to the $8,000 are the provisions in regard to another sum referred to in the same instruments. In the contract of August 25 between Cowardin and Company and Dean the latter agrees to pay to Cowardin and Company the sum of $3,517.50, money paid by Cowardin and Company on account of pay-roll and other expenses during the negotiations between the parties, and to pay all other expenses necessary to be incurred between August 25 and the execution of the proposed contract between Dean and the receiver to be thereafter appointed (16). In this agreement of August 25 nothing is said as to *when* this $3,517.50 shall be paid. This is one of the ambiguities cleared up by the supplemental agreement of August 27 (17, 18). That provides that it shall be paid in cash simultaneously with the execution of the contract with the receiver. Why when the parties were thus dealing deliberately and specifically with the manner and time of the payment of obligations assumed by Dean was nothing said about when the $8,000 should be paid? Why was that matter left in the air? There can be but one answer to that question. Nothing was said on that subject because the $8,000 was to be paid from profits not yet earned and which might never be earned.

It is respectfully submitted that the decree of the Court of Appeals as to this $8,000 should be reversed, and that court directed to remand the case to the Supreme Court of the District of Columbia, with instructions to modify its decree so as to require the receiver to pay to the appellant the sum of $8,000 in controversy.

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Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

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BRIEF FOR COWARDIN, BRADLEY, CLAY AND STAGG.

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THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

BRIEF FOR COMMERCIAL, DRAPER, CLAY AND STACK.

IN THE

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BRIEF FOR COWARDIN, BRADLEY, CLAY AND STAGG.

Statement.

This cause, as it came to this court, involved two sums of money, one of $2,000 and the other of $8,000, in the hands of the receiver of Cowardin, Bradley, Clay & Co., a firm composed of the appellees Cowardin, Bradley, Clay and Stagg. The appellant, in its brief, abandons its contention in regard to the sum of $2,000, which the auditor, the Supreme Court of the District of Columbia and the Court of Appeals had concurred in awarding to Cowardin, Bradley, Clay & Co. So much of the decree below, therefore, as requires the receiver to pay to these appellees the sum of $2,000, it is conceded should be affirmed, with costs and interest.

The facts upon which the controversy with respect to the fund of $8,000 depends are briefly as follows:

Cowardin, Bradley, Clay & Co., having a contract with the United States Government for the construction of a

filtration plant for the city of Washington, and having expended $1,373.07 in money and incurred liabilities to the amount of $14,286.82 in performance of the contract (Rec., pp. 47–8), sublet the work of completing it to the appellees May, Jekyll and Jekyll, trading under the firm name of May & Jekyll, on May 26, 1903, under a contract between them set forth at pages 41–6 of the record—the substantial features of which, for present purposes, were that May & Jekyll should reimburse Cowardin, Bradley, Clay & Co., all their expenditures, should pay all the liabilities incurred by them under their contract, and should complete the work for 90 per cent of the contract price, leaving to Cowardin, Bradley, Clay & Co. the remaining 10 per cent as their profit; and, further, that May & Jekyll should lend to Cowardin, Bradley, Clay & Co. the sum of $10,000, to be repaid by the latter out of their said profit when realized.

On August 25, 1903, a further contract was made between the two firms under which May & Jekyll surrendered their subcontract, and, in consideration of being relieved of it, and of their unpaid liabilities incurred in attempting to perform it, they executed a bill of sale to Cowardin, Bradley, Clay & Co. of the plant which had been accumulated for the purpose of the work, inventoried in Schedule A (Rec., pp. 49–51), as of the value of $101,651.10, it being a further provision of said contract of August 25th that the $8,000 which then remained unpaid of the said $10,000 which May & Jekyll had loaned Cowardin, Bradley, Clay & Co. pursuant to the contract of May 26, 1903, should be paid to May & Jekyll "out of the net profits which may be realized by the parties of the first part," i. e., Cowardin, Bradley, Clay & Co., "from the construction or erection of that portion of the said filtration plant which they have contracted with the United States to construct or erect;" and that, in case Cowardin, Bradley, Clay & Co.

should procure a third party to complete the work, they would make appropriate provision for the payment of the said $8,000 to May & Jekyll, "it being distinctly understood, and hereby declared to be the purpose of this agreement, that the repayment of the eight thousand dollars ($8,000.00) shall be on the contingency that the *parties of the first* shall realize a profit under said contract with the United States, and not otherwise; and that, if any profit shall be so *realized by them*, it shall be applied to the payment of the said eight thousand dollars ($8,000.00), or so much thereof as said profits will pay and satisfy."

On the same day, August 25, 1903, Cowardin, Bradley, Clay & Co., entered into a contract with Henry B. Dean, trading under the firm name of Dean & Shibley, under which in consideration, in substance, of the sale to Dean & Shibley, or to the Sand Filtration Company of America, a corporation to be organized by them, of the said construction plant, and of being employed to complete the filtration contract, Dean & Shibley agreed to pay Cowardin, Bradley, Clay & Co., $65,000, in stipulated instalments as the money was received from the Government for the work, and, further, that Dean & Shibley, or their said corporation, would comply with the provisions and conditions of the agreement of that date between Cowardin, Bradley, Clay & Co., and May & Jekyll, "including, among other provisions, the payment of the sum of $8,000.00 to the said May & Jekyll as in the said agreement is provided, and payment of which is also assumed by the said grantee."

As provided in the said last named agreement, Cowardin, Bradley, Clay & Co., procured the appointment of a receiver for their firm, who, with the court's approval, entered into a contract with Dean on August 27, 1903 (Rec., pp. 18–20), substantially in accordance with the terms of his agreement of August 25th. The

work was completed, the stipulated $65,000 has been paid to Cowardin, Bradley, Clay & Co. with the exception of the $2,000, payment of which was suspended by the appeal in this case, and the only question now in controversy is whether, the Sand Filtration Company having lost money under its subcontract, May & Jekyll are entitled to payment of the $8,000, which is in the hands of the receiver for that purpose if applicable to it.

Under the terms of the agreement between Cowardin, Bradley, Clay & Co. of August 25, 1903, the $8,000 was to be paid to the latter upon a single contingency, namely, that a net profit should be realized "by the *parties of the first part*"—i. e., by Cowardin, Bradley, Clay & Co., from the construction of the filtration plant, whether by themselves or through the instrumentality of some third party procured by them to perform the work. The appellant claims this contingency has not happened,

1. Because the Sand Filtration Company, the third party procured by Cowardin, Bradley, Clay & Co., to perform the work, did so at a loss, instead of at a profit.

2. Because it does not appear by the record that Cowardin, Bradley, Clay & Co. have realized a profit.

I.

The first of these propositions, it is submitted, is concluded by the very language of the agreement of August 25th, under which the question arises. That agreement was that Cowardin, Bradley, Clay & Co. should pay or cause to be paid to May & Jekyll the said sum of $8,000 if *they*, Cowardin, Bradley, Clay & Co. should realize a profit under their contract sufficient for the purpose, and that any profit realized *by them* should be subject to the payment of that sum, or of so much of it as the profit realized would pay. This obligation upon the part of Cowardin, Bradley, Clay & Co. was assumed, in

terms, by Dean in his contract of the same date, and is again assumed in substance in his contract with the receiver on August 27, 1903, the latter agreement providing (Rec., p. 20) that the receiver should deduct from the amounts paid by the United States for the work "the amounts to be paid to or for the benefit of Cowardin, Bradley, Clay & Co. as provided for in the certain contract of sale, dated August 25, 1903, between the said Cowardin, Bradley, Clay & Co., and the party of the second part," i. e., Henry B. Dean. No support, in any of the agreements, is found for the suggestion that the $8,000 was not to be paid to May & Jekyll unless Dean, or the Sand Filtration Company, or any third party who should contract with Cowardin, Bradley, Clay & Co. for the completion of the work, should realize a profit.

II.

The second proposition contended for, namely, that the record fails to show a profit to Cowardin, Bradley, Clay & Co., is equally untenable.

The Supreme Court of the District of Columbia found, as a matter of fact, that there was such a profit (Rec., p. 21), which finding of fact was confirmed by the Court of Appeals (Rec., pp. 59–60). That the concurrent findings of the two courts upon a question of fact will not be disturbed in this court except upon a clear establishment of error by the evidence is a familiar rule. The evidence, however, is clearly and conclusively with the findings below.

At the date of the original contract between Cowardin, Bradley, Clay & Co. and May & Jekyll of May 26, 1903 (Rec., pp. 41, 47–48), the total outlays of the former firm under its contract with the Government, in both money and liabilities, was $15,659.79, all of which was at that time made good to it by May & Jekyll. It has at no time

since made any outlays, or incurred any liabilities, Dean & Shibley having taken up the work where May & Jekyll laid it down, and carried it forward to completion. In addition to the $8,000 advanced to it by May & Jekyll, which is to be repaid, if at all, by the appellant, the firm of Cowardin, Bradley, Clay & Co. has received $63,000 in cash from the receiver, and, it is now conceded, will receive the remaining $2,000, upon the affirmance by this court of the decree below in respect to that fund. If not profit, what is this $73,000?

It is respectfully submitted that there was no error in the decree below, and that it should be affirmed.

J. J. DARLINGTON,
Solicitor for Cowardin, Bradley, Clay and Stagg.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 123.

THE SAND FILTRATION CORPORATION OF AMERICA, APPELLANT,

vs.

SAMUEL P. COWARDIN ET AL., APPELLEES.

BRIEF FOR APPELLEES, MAY & JEKYLL.

STATEMENT OF FACTS.

This is an appeal by the Sand Filtration Corporation of America from an order of the Supreme Court of the District of Columbia, made on October 8, 1906, in the cause of Stagg *v.* Cowardin *et al.*, to which the appellant was a party, and whereby John D. MacLennan, receiver in that cause, was directed to pay out of moneys in his hands the sum of $8,000 to the appellees, May & Jekyll, and $2,000 to the appellees, Cowardin, Bradley, Clay & Company (52-53).

Cowardin, Bradley, Clay & Company, a partnership (hereinafter, for the sake of brevity, called Cowardin and associates), were the original contractors with the United States for the construction of a portion of the sand filtration plant recently built in the District of Columbia. On May 26, 1903, when only a little work had been done under their contract, Cowardin and associates entered into an agree-

ment in writing with the appellees, May & Jekyll, contractors, whereby the latter were employed by the former to complete the contract with the United States (41). By the terms of this agreement it was provided, among other things, that May & Jekyll, in return for their services, were to receive 90 per cent of the contract price received by Cowardin and associates from the United States; that May & Jekyll should advance to Cowardin and associates $10,000, to be repaid to May & Jekyll out of the share of Cowardin and his associates, to be reserved to them from the first partial payment to be made by the United States as the work progressed (44), and that, as a guarantee that they would fully perform and complete the work, May & Jekyll should deposit $50,000 with Darlington & Tucker, trustees, to be expended in the purchase of a construction plant, to be used for the purpose of carrying out the contract with the United States; that the plant should consist of certain articles and implements already purchased and contracted for by Cowardin and associates, and also such additional implements and articles as might be selected by May & Jekyll (43).

On August 25, 1903, May & Jekyll, desiring to abandon the work which they had agreed to do under their previous contract, entered into a new agreement with Cowardin and associates (39), whereby it was agreed that the old contract should be canceled and the obligations of all the parties thereto finally discharged. May & Jekyll, having contracted certain debts in the course of the work, aggregating $34,176.10, Cowardin and associates agreed, by the contract of August 25, 1903, to assume such debts, and to procure the assumption thereof by any third party or parties who might thereafter undertake to complete the contract of Cowardin and associates with the United States. It was also agreed by May & Jekyll that they would have the $50,000 plant they had purchased through the trustees, Darlington & Tucker, and all of the articles of personal property on the site of the filtration plant which they had acquired since they

had undertaken the work, transferred to Cowardin and associates, and Cowardin and associates, in return, agreed to then transfer in trust to Douglas and Kimball, trustees, all of the articles of personal property so to be transferred to them to secure the payment of the debts due from May & Jekyll, as aforesaid.

The contract of August 25, 1903, also contained this provision (39-41):

"Inasmuch as the parties of the second part [May & Jekyll] have heretofore advanced to the parties of the first part [Cowardin and associates] the sum of $10,000 under the eighth paragraph of said contract of May 26, 1903, and there now remains due to the parties hereto of the second part $8,000 thereof, $2,000 having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order the said sum of $8,000 out of the net profits which may be realized by the parties of the first part from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said $8,000, if the same shall not be sooner voluntarily paid by the parties of the first part to the parties of the second part, shall be reserved and paid *out of the 10% of the contract price for said work which will be reserved by the United States;* and if the parties of the first part shall not themselves continue said work under their contract with the United States, but shall procure some third party or parties to perform the same, or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part appropriate provision shall be made for the reservation and payment of said $8,000 to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the $8,000 shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States, and not otherwise; and that if any profit shall be so realized by them, it shall be subject to the payment of the said $8,000, or so much thereof as said profit will pay and satisfy."

It will be observed that the $8,000 mentioned in the quoted extract from the contract last mentioned was to be paid to May & Jekyll "out of the 10 per cent of the contract price for said work which will be reserved by the United States."

This contract of August 25, 1903, ended the connection of the appellees May & Jekyll with the work of constructing the filtration plant, and their only interest thereafter in the work grew out of their claim for the $8,000 mentioned, provided Cowardin and associates should make a profit out of the contract.

On the same day that the second contract with May & Jekyll was executed, namely, August 25, 1903, Cowardin and associates made a contract with Henry B. Dean, trading as Dean & Shibley (14-17), which recited that Dean was interested in the formation of the Sand Filtration Corporation of America, about to be incorporated under the laws of the State of Virginia, to continue the work of constructing the filtration plant as an employee of Cowardin and associates. By this last-mentioned contract Cowardin and associates agreed to transfer to Dean all of the construction plant that they had acquired from May & Jekyll and from the trustees, Darlington & Tucker. In consideration of this transfer, and in further consideration of the agreement of Dean, for himself and the proposed corporation, the Sand Filtration Corporation of America agreed to pay to Cowardin and associates the sum of $65,000, and Dean, for himself and for such proposed corporation, agreed to complete the work of constructing the filtration plant as employees of Cowardin and associates and Dean for himself, and the proposed corporation agreed "to comply with the provisions and conditions of one certain agreement entered into between the grantors (Cowardin and associates) and May & Jekyll, a copy of which is hereto attached and to be read as a part hereof, including, among other provisions, the payment of the sum of $8,000 to the said May & Jekyll, as in the said agreement is pro-

vided, and the payment of which is also assumed by the said grantee" [Dean] (16).

As, however, Cowardin and associates were in financial difficulties, it was agreed that a receiver should be appointed for them and that a contract should be subsequently made between said receivers and Dean, carrying out the provisions of their contract of August 25, 1903, with Cowardin and associates.

Two days later, namely, on August 27, 1903, and apparently after the receiver was appointed, a supplemental agreement was made, and it provided that the receiver of Cowardin and associates was authorized to deduct from the moneys to be paid to him by the Government as the work of construction progressed the sum of $65,000, and also the sum of $8,000 therein mentioned, and to pay the same directly to Cowardin and associates instead of paying it to Dean and then receiving such payments back from Dean, as was apparently provided for by the agreement of August 25, 1903 (17-18).

There is nothing in the record to show that May & Jekyll had any knowledge whatever of this contract of August 25, 1903, between Cowardin and associates and Dean, or that there was any privity of contract whatever between May & Jekyll and Dean. In fact, Mr. Dean, in the proceedings before the auditor to be mentioned, testified that his firm had no connection whatever with May & Jekyll in the transaction, although he had some knowledge of their previous connection with the matter.

After the contract of August 25, 1903, between Cowardin and associates and Dean had been executed, a bill was filed in the lower court by Thomas E. Stagg, one of the members of the firm of Cowardin, Bradley, Clay & Company, against his copartners for the appointment of a receiver, and John D. MacLennan was appointed receiver of the partnership. On August 27, 1903, he entered into a contract with Henry B. Dean, doing business as Dean & Shibley (18), by the

terms of which Dean agreed to carry out the provisions of the previous contract with Cowardin and associates until the proposed corporation should be organized, when it in turn should assume the contract in question. Provision was also made for the payment by the receiver to Dean, and later to the proposed corporation, of all of the moneys received from the United States, excepting the sum of $65,000, or any part of it, and the other amounts specified to be paid to Cowardin and associates or for their benefit (20).

Thereafter the appellant, The Sand Filtration Corporation, seems to have been organized and to have taken the place of Dean under the several contracts mentioned. The work of constructing the filtration plant under the contract with the United States was completed and accepted by the United States in January, 1906, and full payment therefor was made by the United States to MacLennan as receiver for Cowardin and associates. Out of the installments paid by the Government the receiver had paid to Cowardin and associates $45,000 on account of the $65,000 due them, and out of the final payment he paid them $10,000.

Having failed to pay Cowardin and associates the remaining $10,000 due on account of the $65,000, and also the $8,000 which was to be paid to May & Jekyll in event that Cowardin and associates should realize a profit under the contract, as set forth in their contract with the latter of August 25, 1903, Cowardin and associates on March 13, 1906, filed a petition for a rule upon the receiver to show cause why he should not pay these two amounts so retained by him, for a rule on May & Jekyll to show cause why the receiver should not pay to them the said sum of $8,000, and for a rule on the Sand Filtration Corporation to show cause why such payments should not be made. This petition set forth that the refusal of the receiver to pay the said $8,000 to May & Jekyll was based upon two grounds, only one of which it is necessary to mention here, and that was, namely, "That the $8,000 was not to be paid under the terms of the

contract of August 25, 1903, between the said firm of May & Jekyll and these petitioners and the contemporaneous contract of the same date between these petitioners and the said Dean, unless the petitioners realized a profit from their said contract with the United States Government, and, as is contended by the said Sand Filtration Corporation, unless the said Dean or the said company also realized a profit from the said contract, which latter contingency it claims has not occurred, the said work having been completed at a loss, as it alleges, and as these petitioners believe to be true" (4).

The answer of MacLennan, the receiver, admitted the retention by him of the fund, but stated that he was advised that it was unnecessary for him to state in full the contention of the Sand Filtration Corporation, because that company would fully set forth its claim in its answer to the rule laid upon it (8).

The answer of the Sand Filtration Corporation averred that no profits were realized from the work, but that the work was completed at a loss to it of $150,000, and that therefore there was no liability on the part of the petitioners to pay May & Jekyll the $8,000 or any part of it. They further averred that even if the petitioners Cowardin and associates were required to pay the $8,000 to May & Jekyll under the contract of August 25, 1903, the Sand Filtration Corporation was not required to pay that sum or any part of it to the petitioners.

The answer of May & Jekyll avers that under the contract of August 25, 1903, the $8,000 was payable to them, conditioned only upon the making of a net profit by the petitioners, and was not in any way conditioned upon the making of a net profit by any other person or persons or corporation whatever.

The matter having come on to be heard by the lower court upon the petition and the several answers, that court decided that Cowardin and associates had derived a profit under their contract with the Government within the mean-

ing of their contract with May & Jekyll; but it was ordered that another matter concerning which the appellant made a contention, which, however, it abandons on the present appeal, be referred to the Auditor for report (20-21).

Under this order of reference testimony was taken before the Auditor. In view of the abandonment by appellant of all contentions heretofore made by it, save the one relating to the $8,000 it is unnecessary to refer to the testimony taken before the Auditor, save to say that Mr. Dean testified that he had no connection whatever with May & Jekyll in the transaction and did not know that he had bought the articles on the same day that May & Jekyll executed an agreement transferring them to Cowardin and associates, although he had some knowledge of May & Jekyll's previous connection with the matter (37).

The Auditor reported in favor of the appellees and the Sand Filtration Corporation filed exceptions to this report. The court heard the exceptions and passed an order overruling them and directing the receiver to pay forthwith, out of money in his hands, $8,000 to May & Jekyll and $2,000 to Cowardin and associates.

From this order the Sand Filtration Corporation appealed to the Court of Appeals, the latter court affirmed the decree appealed from, and the appellant prosecuted the present appeal.

ARGUMENT.

All of the other contentions made by the appellant in the courts below having been abandoned by it, the single question sought to be raised on this appeal is whether the members of the firm of May & Jekyll are entitled to receive the sum of $8,000 from the receiver of Cowardin and associates. If the appellant is not precluded from raising this question by its express agreement that the receiver should pay the $8,000 to May & Jekyll—as contended in the last paragraph of this brief—the answer to the question depends upon

whether Cowardin and associates made a profit of at least that sum from their contract with the Government. It should be borne in mind that the status of Cowardin and associates, from the time of the acceptance of their bid by the Government until the completion of the work and its final acceptance by the Government, was that of contractors with the Government. May & Jekyll and later Dean, and still later the appellant, were merely employees of the contractors, and after the receiver was appointed for them, employees of such receiver. It is utterly immaterial whether the appellant, as an employee of the receiver, made a profit or sustained a loss by reason of its contract of hiring with the receiver.

Counsel for appellants correctly states the conditions of affairs as between the various parties to this suit, when, after referring to the contract between Cowardin and associates and Dean, whose place was taken by the Sand Filtration Corporation of America, appellant herein, as to the appointment of the receiver of Cowardin and associates, when he says on page 11, "Dean was only an employee of the contractor." Dean, as such employee, undertook the whole responsibility of carrying out the work for the receiver, and could receive the moneys paid by the Government on account of completion of the work only from the receiver, and not directly from the Government. True, the Government looked to Cowardin and associates or its representative and receiver to carry out the contract, and Cowardin and associates could easily, as they in fact did, make a profit out of the contract with the Government, while Dean or the appellant herein lost. It is immaterial to the issue to be decided herein, we repeat, whether the appellant lost or not so long as Cowardin and associates, who are the only parties with whom May & Jekyll contracted, made a profit.

By the contract of August 25, 1903, Cowardin and associates in terms agreed that the $8,000 in question, "if the same shall not sooner be voluntarily paid by the parties of

the first part [Cowardin and associates] to the parties of the second part [May & Jekyll] shall be reserved and paid out of the 10 per cent of the contract price for said work, which shall be reserved by the United States. * * * It being distinctly understood and hereby declared to be the purpose of this agreement, that the re-payment of the $8,000 shall be under the contingency, that the parties of the first part shall realize a profit *under said contract with the United States,* and not otherwise; and if any profit shall be realized by them, it shall be subject to the payment of the said $8,000, or so much thereof as such profit will pay and satisfy."

The contract by May & Jekyll with Cowardin and associates, dated August 25, 1903, was made part of the contract between Cowardin and associates, and Dean, and had been executed prior to the Dean contract, though on the same day. According to Dean's own statement (37) he had no connection whatever with May & Jekyll in this transaction. The latter contract with Dean makes the former contract with May & Jekyll a part thereof, and requires him "in general to comply with the provisions and conditions of one certain agreement entered into between the grantors and said May & Jekyll, a copy of which is hereto attached, and to be read as part thereof, including amongst other provisions *the payment of the sum of $8,000. to the said May & Jekyll,* as in said agreement is provided, and the payment of which is also assumed by said grantee" (16).

The supplemental agreement (18) interpreting the former contract between Cowardin and associates and Dean provides that the receiver may pay the sum of $65,000, as received in installments from the Government directly to Cowardin and associates, and also the sum of $8,000 directly to them, instead of paying the same first to Dean and receiving such sums back from Dean as would appear to be required by the agreement of August 25. The appellant

acted on this subsequent agreement by causing or permitting the receiver to pay in instalments, as they fell due, $55,000 of the $65,000, directly to Cowardin and associates, as set forth on page 3 of the record in the 4th paragraph of the petition for rule for receiver. This is admitted by the answer (11) of the appellants. Having consented, acquiesced and acted upon one part of this contract, the appellants are now estopped from denying the remaining portion of this contract, namely the authority of the receiver to pay the $8,000 directly to Cowardin and associates, or their assigns, under the contract of August 25, 1903, namely, the firm of May & Jekyll.

The appellant and its predecessor, Dean, under whom it claims, not only had notice of the claim of May & Jekyll, and bound themselves to pay it, but expressly agreed that the amount of the claim *should be deducted from and paid out of the moneys to be collected by the receiver from the Government.* Now that the receiver has the $8,000 in his hands, the appellant seeks to repudiate the contract made for it by Dean. It says in its answer to the rule that there is no liability on its part "to pay to the firm of May & Jekyll the said sum of $8,000 or any part thereof." That is not the question here, which is, whether the *receiver* shall pay that sum out of moneys reserved for that specific purpose as expressly agreed by the parties.

The appellant in its answer then goes on to say that even if Cowardin and associates "be required by the true construction of their contract of August 25, 1903, with said May & Jekyll to pay said sum of $8,000 to May & Jekyll, neither said Dean nor this respondent (the appellant), as his successor, is required to pay said sum, or any part thereof" to Cowardin and his associates. The appellant again begs the question. The question is not whether the appellant shall pay the $8,000 to Cowardin and associates, but whether *the receiver* shall deliver to May & Jekyll, or to Cowardin and associates for them, the $8,000 under the ex-

press agreement of Cowardin and associates and the appellant that he should do so.

Dean, when contracting with Cowardin and associates, had full opportunity to embody in his contract a provision that he, Dean, or his successors, the appellant herein, should not submit to compliance with the terms of the agreement contained in the contract between Cowardin and associates, and May & Jekyll, in reference to the payment of the $8,000, unless, he, the said Dean, or his associates, received a profit from the whole work. This he did not do, and having reduced his contract to writing and acted thereon, he is bound by the terms thereof, and cannot now read into his contract words which would alter its meaning. Dean failed to embody in his contract any provision making the payment of the $8,000 conditional upon his, Dean's, or his assign, receiving a profit on the enterprise, and therefore the contention of the appellant that it did not make any profit on the enterprise is immaterial to the point at issue.

With the exception of the condition contained in the contract between Cowardin and associates, and May & Jekyll, there is not one phrase, word or sentence, to be found in any contract or agreement in the record, which imposes any restriction on the payment of the $8,000, out of the 10 per cent of the contract price for said work which was reserved by the United States. The receiver now holds more than $8,000 of this "10 per cent of the contract price," and it is plainly due May & Jekyll, by the express and repeated agreement of all parties.

DID COWARDIN AND ASSOCIATES REALIZE A NET PROFIT OUT OF THEIR CONTRACT WITH THE UNITED STATES?

The opinion of the Court of Appeals, by the Chief Justice of the court, contains a very clear statement in regard to Cowardin and associates realizing a net profit from their contract with the Government. It is as follows:

"The court was right also in holding that the Cowardin Co. derived net profits or more than $8,000 from their contract with the Government. May & Jekyll not only repaid them every dollar of their original outlay—$15,000, in round numbers—but also turned over to them $50,000 worth of additional construction plant and material that had been purchased by them. In the new contract with the Filtration Corporation, the latter assumed the complete performance of the Government contract for the money payable thereunder, and made performance secure by the exacted bond in the sum of $150,000. The Filtration Corporation, in order to secure this contract, took over the plant which had been relinquished by May & Jekyll to the Cowardin Co. at the agreed price of $65,000, payments of which in installments were required to be deducted from the Government's payments by the receiver and paid to the Cowardin Co. Notwithstanding the losses of May & Jekyll on the one hand, and the Filtration Corporation on the other, the Cowardin Co. realized a net profit of say $65,000. Without one dollar of actual expenditure in the performance of their contract with the Government, so far as the record shows, they secured its performance by others, and received the sum of $65,000 for the plant mainly derived from May & Jekyll, who gave it up in order to be released from their first contract."

By an examination of the record it will be seen that reasoning of the Chief Justice is sound in fact and conclusion. The record shows as follows:

The original contract between Cowardin and associates with the Government was dated April 6, 1903. By the contract between Cowardin and associates with May & Jekyll, dated May 26, 1903, the latter agreed (41) to assume and pay the existing obligations and expenses incurred and paid by Cowardin and associates, amounting to $3,145.63, made up of the following items (47): (1) "Obligations due and expenses incurred to be assumed and paid by May & Jekyll," $839.87; (2) "Expenses heretofore paid by Cowardin, Bradley, Clay & Co., to be repaid them by May & Jekyll," $2,305.76.

By the seventh paragraph of the same contract (page 43) May & Jekyll, in order to guarantee the performance of this contract, paid to Darlington and Tucker, trustees, $50,000, to be expended by them for the purchase of the plant. "Said plant shall consist of certain articles and implements already purchased and contracted for by the parties of the first part (Cowardin and associates), and set forth and described in Schedule B, hereto annexed and made a part hereof; and also all such additional implements and articles as may be selected by the parties of the second part." The record (47-48) shows the total amount of expenditure by said trustees for plant of Cowardin and associates was $15,569.79, of which $1,373.07 was repaid to said Cowardin and associates by the trustees for payments already made by them on account of the plant.

In addition to such assumption of the obligations of Cowardin and associates by May & Jekyll, and the repayment by May & Jekyll to Cowardin and associates of all expenditures made by the latter on account of their contract, the firm of May & Jekyll, by the eighth paragraph of this contract (44), agreed to advance Cowardin and associates $10,000, to be repaid and therein specified. Of this $10,000 $2,000 was repaid, and the remaining $8,000 is now subject to controversy.

Coming now to the contract of August 25, 1903, between Cowardin and associates and May & Jekyll (39), cancelling the contract of May 26, 1903, we find by the second paragraph thereof that Cowardin and associates covenanted and agreed "to assume and procure the assumption thereof by any third party or parties who may hereafter undertake to complete the contract of the parties hereto of the first part (Cowardin and associates) with the United States, mentioned in the contract of May 26, 1903, at the instance or request of the parties of the first part as shown on the schedule annexed hereto, and made a part hereof, and marked 'Schedule A.'" This schedule (49) shows a total of $34,176.10.

By the third paragraph of this same contract, May & Jekyll surrendered and assigned to Cowardin and associates all their right, title, and interest in all things pertaining to the filtration plant and work, and agreed to procure from the trustees, Darlington and Tucker, a bill of sale to Cowardin and associates of all the articles of personal property then vested in said trustees, as per Schedule B (50-51), amounting in value to $101,651.10.

In the contract dated August 26, 1903, between Cowardin and associates and Dean, which contract was made in contemplation of a receiver being appointed for Cowardin and associates, it is provided (16):

1. That the appellants [as we term Dean and his successors] assumed and agreed to pay all the debts of May & Jekyll specified in Schedule B; also to comply with the terms of the agreement between Cowardin and associates and May & Jekyll, "including amongst other provisions the payment of the sum of $8,000 to the said May & Jekyll, as in said agreement is provided [that is, out of the ten per cent retent] and the payment of which is assumed by the said grantee" (the appellants herein). This further provides for the payment to the receiver of the sum of $65,000 for the privilege of undertaking to complete the work.

In order further to protect themselves, Cowardin and associates required the appellant to pay them the sum of $3,517.50, "said sum having been paid by the grantors (Cowardin and associates) on account of pay-roll and other expenses since the commencement of negotiation between the parties hereto."

By the supplemental contract of August 27, 1903, between the same parties, explaining the last-mentioned contract, it is provided that the $65,000 and the $8,000 should be paid directly by the receiver to Cowardin and associates (18).

In the fourth paragraph of the petition for rule on receiver (3) filed by Cowardin and associates and admitted in the answer of the appellants (11) it is alleged, under oath,

that the work covered by the contract with the United States was completed and accepted and full payment therefor had been made to the receiver, and that the receiver holds in his hands the $8,000 in controversy.

It will be thus seen that all moneys Cowardin and associates expended on their contract with the Government were repaid them by May & Jekyll, who also assumed Cowardin and associates' then existing financial obligations; that when the first contract with May & Jekyll was cancelled, Dean, and later the appellants, agreed to, and did, assume all of May & Jekyll's obligations and thus relieved Cowardin and associates; and also paid Cowardin and associates $65,000 for the privilege of carrying on the contract, in addition to which they paid Cowardin and associates the $3,517.50 for expenses incurred by Cowardin and associates in connection with the enterprise during the negotiations. In addition, the appellants gave a bond in the penal sum of $150,000 for the faithful performance of the work. The work was faithfully performed. The contract price therefor was paid to the receiver without Cowardin and associates being required to expend a single dollar which had not already been repaid them under the terms of the various contracts heretofore referred to. In addition to thus being reimbursed for all expenditures, and protected from all further liability, Cowardin and associates received from the appellants $55,000 of the $65,000 (the receiver now holding the balance) which in every aspect of the case must have been net profit to Cowardin and associates realized from the construction and erection of the filtration plant which they had contracted with the United States to construct and erect.

In addition to the foregoing, the petition of Cowardin and associates, made under oath, states (4): "The $55,000.00 thus far paid by the receiver to these petitioners, and the remaining $10,000.00 yet to be paid to them under said agreement or contract, entirely, if not altogether, *was profit* realized by these petitioners out of their said contract with

the United States Government." This statement under oath is not denied by the answer of the appellant, but the evasive averment is made in the answer that "no profits were realized" from the work, followed by the statement that Dean and appellant sustained a loss of not less than $100,000 (11-12).

APPELLANT'S CONTENTIONS.

(*a.*)

Counsel for appellant contends that all of the contracts, except the original agreement of May 26, 1903, between Cowardin and associates and May & Jekyll, represent practically a single and simultaneous transaction, and that therefore the condition relating to the payment of the $8,000, made dependent on Cowardin and associates re .zing a profit, should be carried through the other contracts, so that unless Dean or the appellant realized a net profit from the contract, this $8,000 should not be payable to May & Jekyll. It is true that the contracts in question and the appointment of the receiver for Cowardin and associates were made on the 25th and 27th of August, 1903. The petition of Cowardin and associates (2) alleges that their contract with Dean was executed subsequently, but on the same day as their contract with May & Jekyll. The contract with May & Jekyll (39) provides, amongst other things, that Cowardin and associates "covenant and agree to assume and procure the assumption thereof by any third party or parties who may undertake to complete the contract of the parties hereto of the first part (Cowardin and associates) with the United States." It is nowhere in said contract alleged who these third parties may be, and Dean himself, the party with whom the contract was made on the same day, stated in his testimony, on page 37, that he had no connection whatever with May & Jekyll in this transaction. Cowardin and associates, in the contract of August 25, agreed fully to protect

May & Jekyll for the repayment of this $8,000, and this provision was incorporated in their future contracts.

It is claimed by appellant in its brief that roundabout procedure of appointing a receiver for Cowardin and associates, the contract with Dean, and the assumption of that contract by the appellant was essential at law to insure the assignment and repayment of the $65,000 and of the $8,000 out of the funds to be paid by the Government as the work progressed. However this may be, and it is immaterial, yet through these various contracts the appellant undertook to complete the work and assumed the obligations of Cowardin and associates to May & Jekyll and agreed that the receiver should pay the $65,000 and the $8,000 and partially acted thereon. By its contract of August 27 it again expressly recognized the obligation to pay May & Jekyll $8,000 by authorizing the receiver to deduct from the moneys paid to him by the Government proper amounts to insure carrying out of the condition contained in the original contract of August 25. The appellant thereby put it out of its power to claim that there is any other condition connected with the payment of the said $8,000 except that expressly contained in the contract of August 25, namely, that the receiver should pay this amount to May & Jekyll out of the 10 per cent retent held by the Government.

(*b.*)

Appellant in its brief lays much stress upon the apparent failure of May & Jekyll to demand their $8,000 until the completion of the work on the filtration plant and its final acceptance by the Government. As has been seen, this $8,000 was payable out of the 10 per cent of the contract price reserved by the Government until the work was finally accepted, unless sooner voluntarily paid to May & Jekyll by Cowardin and associates. So that if May & Jekyll had demanded of Cowardin and associates that the $8,000 be paid,

immediately after the latter had received from the appellant on account of the $65,000, a sum sufficient to pay the $8,000, on the theory that Cowardin and his associates, under the contract with the appellant, had then realized a profit, within the meaning of the contract of August 25, or had demanded of the appellant that it should pay that sum to them because it had assumed the obligations of that contract, the answer on the part of both Cowardin and his associates and of the appellant would assuredly have been that the money was not then due. Cowardin and associates would have said that not only was the money not due until the Government made the final payment of 10 per cent, but also that it could not be said that they had made a profit under the contract until the work had been finally accepted and paid for by the Government. Cowardin and associates always retained their position of contractors with the Government. It would have been said by them that the appellant might fail to carry out the provisions of the Government contract, in which event Cowardin and associates would be liable over to the Government on their bond to the Government, and the $65,000 received or to be received by Cowardin and associates would be utterly lost. To be sure, Cowardin and associates were protected by a bond given by the appellant, but the surety on this bond might prove insolvent. So that from the standpoint of Cowardin and associates it could not be said, on any theory, that the $8,000 was due May & Jekyll until the work was finally accepted and paid for by the Government, especially as May & Jekyll had agreed that that sum should not be paid until the last installment of the contract price, the 10 per cent retained, should be paid by the Government. The appellant, which had by its contract placed itself in the shoes of Cowardin and associates by assuming the latter's obligation to May & Jekyll, could have made a similar reply to any demand of May & Jekyll for the payment of the $8,000. To such a demand it would have been a perfect answer alone for the appellant to have called May & Jekyll's attention to their express agreement that the $8,000

was to be paid out of the 10 per cent retent; and that appellant would have made such a reply to any such demand is evident, as by delaying to pay the $8,000 until the work was completed and finally accepted by the Government it saved interest on that sum for several years.

(*c.*)

It is contended by appellant that as Cowardin and associates agreed to repay their indebtedness of $8,000 to May & Jekyll out of the net profits which might be realized by them from the performance of the Government work, or "under said contract with the United States" (the contract of August 25 puts it both ways), and as the $65,000 profit made by them was in fact realized not from such work, but from the sale to appellant of the plant which they had acquired from May & Jekyll, it follows that nothing is due May & Jekyll. But appellant, in making this contention, which is hardly more than a play upon words, loses sight of the vital fact that by the very instrument by which Dean acquired for it this plant, he promised, for appellant, to pay for the plant not only the $65,000, *but also to pay the $8,000* debt. That promise, founded upon a valuable consideration, binds the appellant, and it cannot escape from it. It was made with full knowledge of the nature of the debt, and that it was payable out of the 10 per cent retent of the contract price by the Government. It was made with full knowledge that Cowardin and associates could make no other profit out of the Government contract than the $65,000, for all profit in excess of that sum would have belonged to appellant. It was made with knowledge that that $65,000 was in fact profit to Cowardin and associates and nothing else. Having created that profit, how can appellant now deny it?

When the appellant assumed the performance of Cowardin and associates' contract with the Government, it took over from Cowardin and associates the plant, implements,

and contractors' equipment necessary to carry out the enterprise. The appellant by its agreement with Cowardin and associates knew that the latter had by prior contract with May & Jekyll been repaid all expenditures made by them on the enterprise, and agreed to pay Cowardin and associates $65,000.00, which they then knew was net profit of Cowardin and associates (all other expenses and debts of Cowardin and associates having been paid or assumed), and this amount would necessarily remain net profit to Cowardin and associates unless the appellant failed to perform the work for the Government. The work was carried out by appellant and the full contract price paid by the Government. No call was made by the Government on Cowardin and associates to expend any sum in the reduction of the $65,000.00 net profit to Cowardin and associates created by appellant, which net profit was subject only to be defeated by this contingency which never happened. The net profit to Cowardin and associates having thus been created by appellant, and the whole enterprise now being terminated without there having been any alteration or diminution in the sum of the said net profit, appellant is now precluded from denying what its contract expressly created, and from repudiating its express agreement that the receiver should pay May & Jekyll's claim out of the final payment received by him from the Government.

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